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Chairman: Mr. Tulbure ..... (Moldova)

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The meeting was called to order at 10.05 a.m.

Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (*continued*) (A/62/10)

1. **Mr. Abdul Azeez** (Sri Lanka) said that the International Law Commission should thoroughly analyse the source of the obligation to extradite or prosecute, since it was of central importance to the topic. While that obligation had hitherto generally been treaty-based, and had customary status only for specific categories of serious crimes under international law, legal writings, State practice and pronouncements of the International Court of Justice indicated that it was becoming entrenched as a principle of customary international law. For that reason, it would be useful if the Commission were to identify criteria for determining the categories of crimes in respect of which States should be deemed *ipso jure* to be bound by the obligation. In that connection, the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996 would provide invaluable starting material for further work on the topic.

2. While the primary focus of the Commission's deliberations should be on the obligation to extradite and prosecute, it might prove necessary to ascertain the relationship of the obligation to the concept of universal jurisdiction, in view of the obvious linkage between the two notions and the fact that the principle of universal jurisdiction was a key component in the effective implementation of the extradite or prosecute regime.

3. With regard to the scope of the obligation, the Commission should carefully consider the interrelated nature of its two elements. A requested State undoubtedly had the freedom to refuse a request for extradition on the grounds of a legal or other impediment and to prosecute the alleged offender instead. Such a refusal would, however, give rise to an immediate obligation to prosecute so that the suspect did not escape justice. That was the essence of the alternative nature of the obligation, both facets of which were of equal importance. The "triple alternative", namely the surrender of alleged offenders to a competent international criminal tribunal, should not be dealt with in the context of the topic, since it was governed by distinct legal rules and posed problems different from those arising in connection with extradition.

4. The Sri Lankan Extradition Law No. 8 of 1977 made provision for extradition resting on treaty arrangements with foreign States, but it also allowed extradition, without a treaty, on the basis of reciprocity, to certain Commonwealth countries under the Commonwealth Scheme for the Rendition of Fugitive Offenders. Furthermore, enabling legislation to give effect to 12 sectoral conventions on the suppression of international terrorism, as well as the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, made it possible to use those conventions as a basis for extradition when Sri Lanka had no bilateral extradition treaty with the requesting State.

5. While Sri Lankan law did not prohibit the extradition of nationals, that question would be governed by policy considerations, including assurances of reciprocity regarding the extradition of nationals of the requesting State. Legislation implementing the above-mentioned conventions also gave the Sri Lankan courts jurisdiction over crimes occurring in third States, when the offender, who was not one of its nationals, was present in its territory and a decision was taken not to extradite that person.

6. **Mr. Pettigrove** (Australia) said that, although international law was a dynamic discipline which must adapt and change to meet new challenges and the International Law Commission had a vital role to play in that process, the Commission should exercise caution when examining areas of international law which directly touched on matters of an essentially bilateral nature. While the principles elaborated by the Commission on shared aquifers were of undoubted importance given the scarcity of water resources, shared oil and gas deposits were essentially of bilateral interest and any related issues should be resolved by negotiation between the States concerned. For that reason, it was questionable whether the sharing of oil and gas resources was an appropriate topic for consideration by the Commission. If the Commission did proceed with its study of those resources, it should not deal with any matters relating to offshore boundary delimitation. Whether such resources were in fact physically shared was primarily a question of the delimitation of territorial or maritime jurisdictions. Individual circumstances would impact on each situation and States would wish to resolve any

differences through a case-by-case approach. Those differing circumstances could be so complex that they would be difficult to cover succinctly in a single text. Maritime delimitation was definitely a matter for the States concerned, as had been made clear by the 1982 United Nations Convention on the Law of the Sea. In addition, delimitation agreements, once in place, generally contained a unitization clause covering petroleum resources that straddled the agreed boundary.

7. His delegation recognized the particular challenges entailed in distilling generally accepted principles regarding the obligation to extradite or prosecute. The Commission had rightly identified the main issues that must be resolved if work on that topic were to arrive at a useful conclusion. Any examination of the topic should pay due regard to current State practice.

8. Treaties were of primary importance as a source of any obligation to extradite or prosecute. Although there was some merit in exploring the possible customary status of the rule, if it did exist in customary law, it was likely to be limited to specific categories of crimes. While universal jurisdiction might be tangentially relevant to the obligation to extradite or prosecute, it should not be the focus of the Commission's work in that area.

9. The Commission's deliberations on objections to reservations to treaties should shed light on the real issues of the timing, content and effect of objections to reservations. It was important for the guidelines to be clear about the effects of, for example, joint formulation and pre-emptive objections. Similarly the precise meaning and application of draft guideline 2.6.15 on late objections required some clarification.

10. While the adoption of the commentaries to the draft guidelines dealing with the incompatibility of reservations with the object and purpose of the treaty, reservations to a provision reflecting a customary norm, reservations contrary to a rule of *jus cogens* and reservations to provisions relating to non-derogable rights was welcome, the rationale for permitting reservations in some of those categories, but not in others, remained somewhat obscure.

11. **Mr. Sheeran** (New Zealand), welcoming the progress made on the topic of reservations to treaties, said that it was to be hoped that the International Law Commission would complete its work on the subject in the current quinquennium. The Commission had been right to adopt a flexible approach in draft guideline 3.1.5 and to provide general indicia, rather than a precise criterion, for defining the object and purpose of a treaty. Nevertheless it was often difficult to spell out precisely what constituted the object and purpose of a given treaty and it was questionable whether a reference to terms such as "essential elements" or "general thrust" really provided more generic guidance on that count. The explanatory material in the commentary was, however, a valuable guide to ascertaining the object and purpose of a particular treaty.

12. The question of whether particular categories of treaties should be treated differently from others with regard to the consequences of an invalid reservation was difficult to answer. In principle, it would be preferable to apply the same set of rules on reservations to all treaties. Nonetheless there was merit in the argument that some treaties, in particular human rights treaties, might call for different treatment. It would be unsatisfactory if a State could, in effect, limit its commitments under a human rights treaty by formulating a general reservation that either severely limited its undertakings to respect its citizens' human rights or, by inviting objections, absolved the State from giving effect to the treaty at all. Similar arguments could be put forward in respect of certain other categories of treaties. Consequently, while a coherent approach would be most beneficial for international law and the stability of treaty relations, exceptions might be necessary.

13. His Government supported the Special Rapporteur's suggestion that it would be wise to incorporate the idea contained in draft guideline 2.6.10 (that it would be desirable for States to provide reasons for objections to reservations) in an additional guideline recommending that States should provide reasons when making a reservation.

14. The draft articles on the law of transboundary aquifers struck a good balance between the competing interests at stake, including between the use and preservation of that scarce natural resource, a matter which was of crucial importance. The Commission should therefore complete the second reading of the draft articles independently of any future work on issues relating to oil and natural gas. Completion of the consideration of the draft articles on aquifers would be helpful in determining the potential direction,

substance and value of any work that could be carried out by the Commission on oil and natural gas.

15. The way in which transboundary aquifers were managed had to take account of the specific features of each individual aquifer and had to be worked out by the relevant countries at the regional or local level. For that reason, the draft provisions might well be more effective if they were cast as recommendatory principles rather than as a convention, because the risk with a convention was that not enough States might be sufficiently motivated to support it, become a party to it and bring it into force. In contrast, a set of recommendatory principles would represent an authoritative statement of the international standards and best practice which should be followed and given practical effect at the bilateral and regional levels. As such, draft principles would offer a framework for conducting the requisite bilateral and regional negotiations and resolving any potential disputes.

16. With regard to the topic of the obligation to extradite or prosecute, it was essential to make a thorough analysis of the international treaty obligations and national laws bearing upon that obligation in order to gain a more detailed understanding of the scope of the obligation and to determine the direction of the Commission's future work on the topic. The Commission should be open-minded about the final form its work would take.

17. He commended the Special Rapporteur's careful treatment of the relationship between the obligation to extradite or prosecute and the principle of universal jurisdiction. Despite a degree of connection, universal jurisdiction was a separate concept; its purpose and the consequences flowing from its invocation were dissimilar. The Commission should not, therefore, dwell too much on the principle. In fact, it would be preferable to deal with universal jurisdiction only to the extent that was strictly necessary, perhaps in the commentaries to the Commission's final product.

18. The Special Rapporteur should also refrain from further examination of the "triple alternative", because surrender to an international tribunal differed substantially from the act of extradition and was governed by a distinct set of treaty obligations and arrangements. The question of the possible customary status of the obligation to extradite or prosecute should be treated with caution, since it had not yet been established by a thorough review of State practice and *opinio juris*.

19. He welcomed the inclusion in the Commission's long-term programme of work of the topics "Protection of persons in the event of disasters" and "Immunity of State officials from foreign criminal jurisdiction". It was likewise encouraging to note that the Commission was willing to tackle the subject of the most-favoured-nation clause.

20. **Mr. Roelants de Stappers** (Belgium) said, in response to the questions posed by the Commission in paragraph 23 of its report (A/62/10), that a contested reservation that ran counter to article 19 of the Vienna Convention on the Law of Treaties must be considered invalid. The reservation therefore had no effect and the reserving State was thus bound by the treaty as a whole, including the provision to which its invalid reservation related, without being able to enjoy the benefit of the reservation. For his delegation, that was a position of principle not based on practical considerations. In that regard, he recalled the detailed comments made by his delegation in the Sixth Committee at previous sessions.

21. Moreover, there was no reason to depart from the rules of the Vienna Convention on the Law of Treaties in the case of normative multilateral treaties, including human rights, environmental protection and codification treaties. Reservations to such treaties could perfectly well be covered by the general regime of the law of reservations, as codified by the Vienna Convention. If that regime was properly understood, no *lex specialis* seemed necessary.

22. With regard to the legal effects of objections to valid reservations, his delegation considered that the 1969 and 1986 Vienna Conventions fully regulated the legal effects of objections to valid reservations. As the Commission had rightly noted, the Conventions provided for two categories of objection: simple objections (art. 21, para. 3) and sweeping objections (art. 20, para. 4 (b)). Belgium did not recognize the intermediate or the super-maximum effect of objections to valid reservations. To allow for an intermediate effect would do even greater damage to the contractual relations between the parties. As for the super-maximum effect, his delegation recalled that only an objection to an invalid reservation — namely a reservation contrary to article 19 of the Vienna Conventions — could have a super-maximum effect.

To allow an objection to a valid reservation to have such an effect would be to remove any distinction between the effects produced by an objection to a valid reservation and those produced by an objection to an invalid reservation.

23. **Mr. Dahmane** (Algeria) said, on the topic of the effects of armed conflicts on treaties, that his delegation continued to oppose the inclusion of internal conflicts in the definition of armed conflict in draft article 2, because it would introduce complications related to the scope and intensity of an internal conflict. On the other hand, situations of foreign occupation, which were, in effect, ongoing conflicts, should be included in the scope of the topic.

24. The reference in draft article 8 to articles 42 to 45 of the Vienna Convention on the Law of Treaties should be made more explicit. With regard to the non-exhaustive list of treaties in draft article 7, his delegation agreed that, rather than list categories of treaties, it would be better to define criteria for determining whether the object and purpose of the treaty implied that it should continue to apply during an armed conflict.

25. On the very sensitive topic of expulsion of aliens, his delegation encouraged the Commission to study national practice and stressed the importance of taking into account the legal status of the alien in the expelling State. His delegation was of the view that nationals should not be expelled, a position that was in conformity with many national constitutions and international instruments; the exception to that rule presented in draft article 4 should be deleted. However, the situation of individuals possessing more than one nationality merited closer study. A specific reference to terrorism in draft article 5 was useful and should be retained, since the concept of "national security" was vague and imprecise. The importance of compliance with the international instruments prohibiting collective expulsion in peacetime could not be overstressed; in wartime, the term "temporary removal" was more appropriate in that regard than "expulsion".

26. With regard to the obligation to extradite or prosecute, the Commission should analyse further the source of the obligation. Although the obligation was largely treaty-based, it had acquired customary status, at least with respect to the most serious international crimes, and that category was not limited to the crimes prosecuted in international criminal tribunals but also included others, such as terrorism, torture and corruption. The best approach would be to define the criteria for determining the categories of crimes in respect of which States were bound by the obligation. With regard to the Commission's questions about universal jurisdiction, his delegation reiterated its position that the obligation would apply only if the person to be prosecuted was present in the territory of the forum State. The "triple alternative" of surrender to an international criminal tribunal should not be included in the scope of the topic. The concerns of some delegations about limiting the obligation to two alternatives, neither of which their country was in a position to apply, were certainly understandable but could be addressed by a more detailed study of the conditions for extradition.

27. **Ms. Telalian** (Greece) said that topic of reservations to treaties was highly sensitive and complex, and legal clarity regarding the formulation and legal effects of reservations would greatly contribute to strengthening international law and treaty relations among States. Her delegation looked forward to the early fruition of the process of adoption of the draft guidelines and commentaries.

28. The core issue was the operation of the system of objections and acceptances and the legal effects of invalid reservations. The freedom to formulate a reservation did not mean that States were free to make reservations incompatible with the object and purpose of the treaty, as such reservations would jeopardize the effectiveness of the treaty and undermine its integrity, particularly in the case of multilateral standard-setting treaties. That position was in keeping with article 19 (c) of the Vienna Convention on the Law of Treaties. However, if a State did formulate a reservation incompatible with the object and purpose of the treaty, such a reservation should be considered null and void and should not be subject to the system of acceptance provided for in article 20, paragraph 4, of the Vienna Convention. The notion of presumption of acceptance reflected in draft guideline 2.8 should apply only in respect of reservations that had successfully passed the test of compatibility with the object and purpose of the treaty.

29. Some States, including her own, had developed the practice of severing a reservation on the grounds of its incompatibility with the object and purpose of the treaty. That meant that they did not exclude the continuity of treaty relations with the reserving State,

although they did not accept the intended effect of its reservation. The aim of such a reaction by States was to open up a "reservations dialogue" with the reserving State to convince it to modify or withdraw its reservation or to withdraw from the treaty as a whole, if it considered such a reservation to be an absolute condition for its consent to be bound by that treaty. Such a reaction could also help a treaty monitoring body, if it possessed the competence, to determine the compatibility of the reservation with the object and purpose of the treaty. That approach was followed by the European Court of Human Rights, which had applied the severability doctrine in respect of invalid reservations. A different approach, however, had been followed by the International Court of Justice in its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.

30. Her delegation agreed with the basic idea behind draft guideline 2.6.3, but it was of the view that States had the "option" rather than the "freedom" to formulate an objection to a reservation, and that they had that option irrespective of whether or not the reservation was incompatible with the object and purpose of the treaty. That approach was in line with relevant State practice and the practice of the Secretary-General as depositary of multilateral treaties. The phrase "for any reason whatsoever", however, allowed room for arbitrariness and should be deleted.

31. The scope of draft guideline 2.6.5 was unnecessarily broad in allowing any State and any international organization that was entitled to become a party to the treaty to formulate an objection. The provision did not correspond to the meaning of article 23, paragraph 1, of the Vienna Convention, which merely provided that reservations or objections should be communicated to States entitled to become parties to the treaty. The pre-emptive objections contemplated in draft guideline 2.6.14 should be considered declarations of principle or interpretative declarations, rather than objections within the meaning of the Vienna Convention. They would need to be reaffirmed once the reservations had been formulated. Draft guideline 2.8.2, in allowing States not yet parties to a treaty to accept a reservation, was inconsistent with draft guideline 2.8, according to which only contracting States or international organizations could accept a reservation; article 20 of the Vienna Convention was silent on that point.

32. With regard to draft guideline 3.1.12 on reservations to general human rights treaties, her delegation wished to reiterate its position that, despite the special character of such treaties and the non-reciprocal nature of the rights and obligations they contained, they should come under the existing system of reservations established by the Vienna Convention. No special regime should be envisaged for them, so that there was no reason why a separate guideline regarding the compatibility of a reservation with the object and purpose of such treaties was needed.

33. **Mr. Tugio** (Indonesia) said, with regard to the topic of shared natural resources, that there was growing recognition of the importance of safeguarding groundwater, which provided more than half of humanity's freshwater needs. Whereas groundwater was a life-supporting resource of mankind, oil and gas were significantly different from groundwater in their characteristics. His delegation therefore concurred with the approach of conducting a study of oil and gas separately and independently from that on groundwater.

34. Some of the draft articles on the law of transboundary aquifers should be revisited in order to fill gaps in relation to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes. The draft articles still did not adequately address the situation of an aquifer or aquifer system that crossed international boundaries but had no hydraulic connection to surface water resources or had a hydraulic connection only to a river or lake located entirely within a single nation. The contribution to the formation and recharge of the aquifer or aquifer system, mentioned in draft article 5, paragraph 1, as a factor in determining the level of reasonable use of the transboundary aquifer by a State required further clarification, particularly when an aquifer and its recharge zone were in different States.

35. Despite the non-renewable nature of non-recharging transboundary aquifers and oil and gas, caution should be exercised in applying to oil and gas the principles elaborated for groundwaters. A claim to oil and gas deposits straddling an international border would normally fall within the bilateral realm, and in practice the use of oil and gas and mineral resources so situated would be regulated by the boundary agreement between the States concerned. The questionnaire to be circulated to States on their practice in that regard was welcome.

36. As an archipelagic State sharing maritime boundaries with a number of other States, Indonesia attached great importance to the principle of unitization. The handbook on the delimitation of maritime boundaries published by the Division for Ocean Affairs and the Law of the Sea provided good illustrations of the principle. Joint development agreements were a practical way to exploit transboundary oil and gas deposits. Several such agreements were already in operation and should be considered in the Commission's study on the topic.

37. Moreover, oil and gas exploration was often conducted in offshore areas. In certain situations coastal States were entitled to extend their rights to the continental shelf to the Area considered the common heritage of mankind under the law of the sea, another factor the Commission should take into consideration. Above all, his delegation wished to stress that the sovereignty of a State over the natural resources located within its boundaries was a well-established principle of international law.

38. The obligation to extradite or prosecute (*aut dedere aut judicare*) was a legal mechanism to ensure criminal prosecution of perpetrators of crimes and deny them safe haven. Neither of the two alternative elements of the obligation should be given priority over the other, as the choice of how to implement the obligation was at the discretion of the custodial State. The main objective of extradition was to provide a judicial mechanism for State cooperation in combating crimes of mutual concern. In practice a State applied the double criminality principle in determining its obligation to extradite, consistent with its constitution or national law. Extradition was primarily a treaty-based obligation, so that a State's discretion was generally limited by the bilateral treaties to which it was a party. In addition, the obligation to extradite or prosecute was established through a number of multilateral treaties. More then 20 international crimes regulated by convention were subject to that obligation, including terrorism, money-laundering, smuggling of persons and corruption.

39. Only in the case of certain heinous crimes, such as genocide, war crimes and crimes against humanity, did customary international law apply the parallel principle of universal jurisdiction, whereby any State had the right to exercise jurisdiction over persons allegedly responsible for such crimes. In brief, universal jurisdiction was an exceptional jurisdiction to be exercised in exceptional circumstances. His delegation doubted that the so-called "triple alternative" would apply to any crimes other than the categories defined by customary law.

40. **Mr. Baghaei Hamaneh** (Islamic Republic of Iran) said that, in dealing with the topic of reservations to treaties, it was imperative for the Commission not to alter the flexible regime established in the 1969 and 1986 Vienna Conventions.

41. His delegation supported the content of draft guideline 2.6.3 on freedom to make objections and stressed that objections to reservations should be formulated in accordance with the principles of international law, including that of the sovereignty of States. An objection to a reservation, like the reservation itself, was a unilateral act and, as such, could not override the legal effect of the reservation.

42. With regard to draft guideline 2.6.5 concerning the author of an objection, his delegation was of the view that only parties to the treaty should be entitled to object to a reservation. Reservations and objections thereto created bilateral legal relations between the receiving and objecting State in respect of their obligations arising from the treaty. There should be a balance between the rights and obligations of States. Even a signatory State had only a minimum negative obligation to refrain from acts that were incompatible with the object and purpose of the treaty; it was not legally bound to meet the other obligations arising therefrom. Reservations and objections could cover a wide range of subjects ranging from the substantive to the purely procedural. There was no legal basis for giving a signatory State, let alone a non-party, the right to object to reservations when its obligation vis-à-vis the other parties were limited to refraining from acts that were incompatible with the object and purpose of the treaty. Draft guideline 2.6.5 should be revisited in order to make it clear that non-parties could not object to a reservation until they expressed their consent to be bound by the treaty.

43. His delegation was in favour of the 12-month time period established in draft guideline 2.6.13 for formulating an objection, which was in line with article 20, paragraph 5, of the Vienna Conventions. However, draft guideline 2.6.14 on pre-emptive objections, which was based on a vague, imprecise notion and contravened the principle of free consent of States, should be deleted. Pre-emptive objections would

dissuade potential future parties from acceding to international treaties, compromise the universality of treaties and hinder the development of international law. They would alter the Vienna regime substantially, cause legal uncertainty and send potential reserving States a political signal that their reservations would have no legal effect on the treaty or on obligations arising from it.

44. On the topic of shared natural resources, his delegation wished to highlight the established legal principle — enshrined, inter alia, in General Assembly resolution 1803 (XVII) of 1962 — that States had permanent sovereignty over their natural resources. He agreed with the proposal to focus on the subject of shared groundwaters and proceed with the work on the law of transboundary aquifers with a view to completing the Commission's second reading of the draft articles.

45. However, that legal regime should not be applied to other types of shared natural resources. In particular, his delegation did not consider it advisable to commence work on the subject of oil and gas, which were of great strategic, economic and developmental importance and were managed and exploited through bilateral cooperation and mutually agreed arrangements. It also wished to stress that the Commission had no mandate to consider the environmental aspects of fossil and hydrocarbon fuels under the topic.

46. The obligation to extradite or prosecute (*aut dedere aut judicare*) had become important in the effort to put an end to impunity and combat serious crimes such as drug trafficking, corruption and terrorism. A State in whose territory an alleged offender was found had an obligation under a relevant treaty to extradite or prosecute, but it also had the sovereign right to decide which alternative was appropriate. The Commission's report on the topic, including its study on State practice, did not demonstrate the existence of an international customary rule that obliged States to extradite or prosecute in the absence of a treaty obligation except with regard to limited categories of international crimes. In its judgment of 26 February 2007 in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*), the International Court of Justice stated that "the obligation to prosecute imposed by Article VI [of the 1948 Convention] is ... subject to an express territorial limit. The trial of persons charged with genocide is to be in a competent tribunal of the State in the territory of which the act was committed, or by an international penal tribunal with jurisdiction".

47. The Islamic Republic of Iran was a party to a number of international instruments that established the obligation to extradite or prosecute in cases involving drug trafficking, transnational organized crime and terrorism. Its 1960 Extradition Act established that cooperation in the extradition of alleged or convicted offenders must be conducted on the basis of bilateral extradition treaties or, in their absence, on the basis of reciprocity; a similar provision was included in all his Government's bilateral agreements on mutual legal assistance and extradition.

48. With regard to the topic of the responsibility of international organizations, it was necessary to distinguish between the responsibility of States and that of international organizations. Where an organization failed to honour its obligation to preclude breach of a peremptory norm of general international law (*jus cogens*), it would be more appropriate to require its member States to take appropriate measures to empower it to discharge its responsibilities rather than authorizing them to act in an arbitrary manner inconsistent with the organization's purposes and principles.

49. With respect to compensation, a lack of funds could not be invoked in order to absolve an organization of its obligation under international law. Its member States should provide the organization with the necessary assistance in accordance with its internal rules. In cases where the responsible organization, as a legal person, had the responsibility to pay compensation for the injurious consequences of its act or omission, the brunt of the responsibility should be borne by those of its member States which, owing to their role in policymaking or to their position in the overall structure of the organization, had contributed to the injurious act. Similarly, the general membership should not bear the financial consequences of an illegal or *ultra vires* measure adopted by the organization or its constituent bodies under the influence of a limited number of member States that enjoyed special discretionary power under the rules of the organization.

50. A distinction should be drawn between cases in which an international organization requested its member States to take a certain measure, and those in which it authorized them to do so; authorization conferred

on the members the right to involve themselves, for example, in enforcing a decision of the organization. In such cases, member States had the right, but not the obligation, to take action; their conduct should therefore be considered their own rather than that of the organization.

51. **Mr. Mongkolnavin** (Thailand) said that the draft articles on shared natural resources should elucidate the differences between surface water and groundwater with respect to flow, storage characteristics and water quality.

52. The principle embodied in draft articles 4 and 5 on equitable and reasonable utilization was of prime importance for sustainable development and management of transboundary aquifers. Guidelines identifying the salient factors affecting different water uses might be useful, and aquifer characteristics that determined groundwater quantity and flow should be covered in view of their relevance to equitable allocation. Draft article 6 on the obligation not to cause significant harm to other aquifer States should define the terms "significant harm" and "impact", discuss the meaning of the term "appropriate" and state who should determine the measures to be taken. In draft article 7 on the general obligation to cooperate, a clear definition of "equitable and reasonable utilization" and "appropriate protection" should be provided.

53. In paragraph 1 of draft article 8 on regular exchange of data and information, the term "readily available data and information" was unclear; the minimum level of data needed in order to assess the condition of the aquifer system and to ensure equitable and reasonable utilization should be stipulated. In connection with paragraph 2, a list of current practices and standards would help the aquifer States to "employ their best efforts to collect and generate more complete data and information relating to such aquifer or aquifer systems, taking into account current practices and standards"; similar clauses might also be desirable in order to ensure a consistent data collection procedure.

54. Draft articles 9, 10 and 11 formed a sequence. Careful attention should be given to recharge and discharge zones and prevention, reduction and control of pollution, as those aspects were the keys to acceptable water quality. A clause requiring an aquifer vulnerability or risk assessment based on readily available hydrological and topographical data should be included in draft article 11 as a basis for the adoption of regulatory control measures.

55. A clause indicating that the aquifer States, in consultation among themselves, would formulate the objectives of monitoring, on the basis of which the monitoring system and parameters to be monitored would be decided, should be added to draft article 12 on monitoring. Draft article 13 on management could be linked to draft articles 4, 9, 10 and 11 or a combination thereof; a general clause should be drafted to indicate those linkages and stress the need for aquifer States to cooperate in harnessing the resources of transboundary aquifers.

56. His delegation shared the view that oil and gas should be considered separately from transboundary aquifers.

57. Although the obligation to extradite or prosecute (*aut dedere aut judicare*) was an important tool in combating impunity and denying safe haven to offenders, as in the case of terrorism, it should not be interpreted in a manner that undermined the State's sovereign right to follow its own criminal justice system. Draft article 1 on scope of application provided a good basis for further work, but much remained to be done with respect to the scope *ratione materiae* and *ratione personae* and to the jurisdictional basis for the obligation to prosecute.

58. His Government considered that it met the obligation to extradite or prosecute. It extradited alleged offenders to States with which Thailand had extradition agreements, and the 1929 Extradition Act provided for extradition in the absence of such an agreement. Under the Act, the Government, at its discretion, could surrender to foreign States persons accused or convicted of crimes committed within the jurisdiction of those States, provided that the crimes were punishable under Thai law with imprisonment for no less than one year. Thailand could extradite a fugitive even to States which could not provide reciprocity owing to legal obstacles, as in the case of offences that carried the death penalty.

59. Section 7 of the Thai Penal Code provided that sexual offences and offences relating to the security of the Kingdom or to terrorism, counterfeiting, falsification, robbery or piracy could be prosecuted in Thailand even if they had been committed abroad.

60. Universal jurisdiction was an important element of the obligation to extradite or prosecute; otherwise, the requested State would be left with no alternative to the extradition of alleged offenders with which it had no connection since, following the principle of *nullum crimen sine lege*, it could not prosecute offenders over which it had no jurisdiction.

61. Lastly, his delegation suggested that the Commission should conduct a study in order to identify grounds for refusal of extradition, focusing on the obligation to prosecute.

62. **Ms. Rodríguez de Ortiz** (Bolivarian Republic of Venezuela) said that her delegation attached great importance to the topic of shared natural resources. It endorsed the Special Rapporteur's proposal that the International Law Commission should proceed with the second reading of the draft articles on the law of transboundary aquifers in 2008 and treat that subject independently of any future work by the Commission on oil and gas. Such future work would, in her delegation's view, require the support of comments and recommendations by Governments before it could be properly tackled by the Commission.

63. With regard to the draft articles on the law of transboundary aquifers, particularly draft article 3, her delegation considered that the commentary should emphasize the importance of the principle of sovereignty more strongly. As it stood, the second sentence of draft article 3 implied that the exercise of sovereignty over an aquifer or aquifer system was subject exclusively to the draft articles; yet that ran counter to Principle 2 of the Rio Declaration on Environment and Development.

64. Her delegation had taken note of the questionnaire on State practice with regard to oil and gas prepared by the Working Group on shared natural resources.

65. **Ms. Seçkin** (Turkey) said her delegation continued to hold the view that the final form of the work of the International Law Commission on the topic of shared natural resources should be a non-binding instrument in the form of guidelines. The law on transboundary groundwaters and the question of oil and gas should be treated as two separate issues.

66. The obligation to extradite or prosecute (*aut dedere aut judicare*) was of crucial importance to efforts to combat impunity and end safe havens. Her delegation concurred with the view that the title of the topic should remain unchanged. It also shared the Commission's view on the need to determine the precise meaning of the part of the obligation referred to as "*judicare*". Generally, a list of definitions would be welcome. Given that international criminal tribunals had jurisdiction over a limited number of crimes, her delegation had doubts about the "triple alternative". Lastly, her delegation welcomed the Special Rapporteur's intention to conduct a systematic review of treaties, national legislation and judicial decisions.

Agenda item 165: Observer status for the Conference on Interaction and Confidence-building Measures in Asia in the General Assembly (A/62/232; A/C.6/62/1/Add.1; A/C.6/62/L.8)

67. **Mr. Sadykov** (Kazakhstan), introducing draft resolution A/C.6/62/L.8 on observer status for the Conference on Interaction and Confidence-building Measures in Asia in the General Assembly, drew attention to the information contained in the explanatory memorandum in annex I to document A/62/232 and the letter dated 4 September 2007 from the Minister for Foreign Affairs of Kazakhstan to the Secretary-General, contained in annex III of the same document. The secretariat of the Conference was currently engaged in establishing links with the Organization for Economic Cooperation and Development, the Eurasian Economic Community, the Shanghai Cooperation Organization and the South Asian Association for Regional Cooperation. He was confident that granting the Conference observer status in the General Assembly would provide a sound basis for regular cooperation between the Conference and the United Nations in resolving the problems facing both bodies.

68. The following States wished to become sponsors of the draft resolution: Chile, the Islamic Republic of Iran, Israel, Japan, Madagascar and Mongolia.

Agenda item 166: Observer status for the Cooperation Council for the Arab States of the Gulf in the General Assembly (A/62/233; A/C.6/62/1/Add.1; A/C.6/62/L.7)

69. **Mr. Sallam** (Saudi Arabia), introducing draft resolution A/C.6/62/L.7 on observer status for the Cooperation Council for the Arab States of the Gulf, explained that the Cooperation Council was a multidisciplinary intergovernmental and international organization, all six members of which were also States

Members of the United Nations and members of other international and regional organizations. The members were all committed to the purposes and principles of the United Nations, in particular, the maintenance of international peace and security, the peaceful settlement of disputes and support for human rights.

70. The complementary role played by regional and subregional organizations in achieving the purposes and principles of the United Nations was recognized in the Charter. On the basis of those principles, and as an independent international legal entity, the Cooperation Council had submitted the draft resolution contained in document A/C.6/62/L.7, in accordance with the view expressed by its Ministerial Council at its one-hundred-and-second session, that the opening of a representative office to the United Nations and the grant of observer status would be in keeping with the goals of the United Nations and the causes with which it was concerned. Moreover, the grant of observer status would strengthen the relationship between the Cooperation Council and the United Nations, facilitate the work of the Council and provide an opportunity for its interaction with other Member States and regional organizations, under the auspices of the United Nations. The Council could contribute a unique regional perspective to the United Nations and was prepared to share its practical experience and cooperate constructively in accordance with Chapter VIII of the Charter. Therefore, his delegation called upon Member States to support the draft resolution.

71. Belarus, Bosnia and Herzegovina, Cameroon, China, Ethiopia, Guatemala, Indonesia, Lesotho, Malaysia, Mali, Uganda, Ukraine and the United Republic of Tanzania had also expressed a wish to become sponsors of the draft resolution.

72. **Ms. Pino Rivero** (Cuba) said that her delegation wished to become a sponsor of the draft resolution.

The meeting rose at 11.50 a.m.

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Chairman: Mr. Tulbure ..... (Moldova)

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Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (*continued*)

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07-58358 (E)

The meeting was called to order at 10.05 a.m.

Agenda item 82: Report of the International Law Commission on the work of its fifty-ninth session (*continued*) (A/62/10)

1. **Mr. You** Ki-jun (Republic of Korea) said, on the topic of reservations to treaties, that his delegation supported the consensus in the Commission not to deviate from the relevant provisions of the 1969 and 1986 Vienna Conventions on the Law of Treaties and the 1978 Vienna Convention on Succession of States in respect of Treaties. Although most of the draft guidelines on reservations to treaties provisionally adopted so far by the Commission were highly technical and primarily of interest to treaty lawyers in foreign offices, the Commission had begun consideration of some of the most important substantive issues on the topic concerning the validity of reservations, with a focus on the prohibition in the Vienna Conventions on reservations incompatible with the object and purpose of the treaty. Draft guideline 3.1.5, which offered a new definition of object and purpose, draft guideline 3.1.17, which prohibited reservations worded in such a way that their scope could not be determined, and the draft guidelines on reservations to general human rights treaties and to dispute settlement and monitoring provisions went to the heart of some very controversial issues about the extent to which ratifying States might exempt themselves from treaty provisions through reservations. The debate on those proposals had revealed a wide divergence of views.

2. Reservations, for better or worse, were necessary to secure the participation of many States in treaty regimes, and it would be counterproductive to adopt overly restrictive limits on them. A balance should be sought between broad participation of States in multilateral treaties and the maintenance of unity in treaty regimes. The Special Rapporteur seemed to recognize the problem, but resolution of the issues in the Commission was likely to be difficult. In particular, his delegation was doubtful about the prospects of arriving at a general definition of "object and purpose of the treaty".

3. On the topic of shared natural resources, he said that the draft articles on the law of transboundary aquifers in their current form closely resembled the substantive provisions of a framework convention. Some of the obligations set out in the draft articles nevertheless went beyond the current obligations of States and did not constitute a codification of customary law or reasonable progressive development of that law. They did address most of the substantive and procedural obligations that would logically constitute the core of a convention. However, if the draft articles did take the form of a convention, a dispute settlement mechanism going beyond the provisions in draft article 14, paragraph 3, would be necessary. As with any instrument on the sharing of resources disputes, were possible, and it would be wise to formulate provisions similar to those in the 1997 Watercourses Convention.

4. Among the other important issues to be resolved on second reading was the relationship between the framework convention and other agreements on the management and protection of transboundary aquifers, a number of which had already been concluded. The question therefore arose as to which would take precedence in the event of conflict between them, or as to whether the framework convention would be merely residual in character. His delegation was of the view that parties to a framework convention should have the option of joining with other aquifer States in concluding agreements that might diverge in substance from the convention, taking into account their local situation, in order to manage their common aquifers as they deemed best.

5. Another issue concerned States parties to the framework convention that did not share transboundary aquifers and, on the other hand, States that shared transboundary aquifers but were not parties to the convention. The draft articles contemplated the possibility that non-aquifer States could become parties and imposed obligations on them with respect to activities that might affect aquifer States. However, the articles on cooperation, information exchange, protection of ecosystems, pollution control and management did not apply to non-aquifer States. Without any real incentives for non-aquifer States to join, it was likely that only aquifer States would become parties to such an instrument.

6. There was also the question of whether States parties should be charged with obligations to protect the aquifers of non-party States from damage caused by activities in their territories. The widespread dependence of human populations and some ecosystems on such aquifers might be an argument for doing so, to the extent that the convention was

designed to protect resources in which the international community as a whole had a significant interest. On the other hand, States parties might be reluctant to incur potentially significant obligations for the benefit of States that had not themselves accepted the duties of the convention.

7. As an alternative, the articles could be recast as a recommendatory set of principles by removing some of the mandatory language. In practice, it might not matter greatly which of the alternatives was chosen, since States with important transboundary aquifers would probably prefer to negotiate specific agreements with their neighbours rather than to rely on a framework convention. Whatever the final form, the articles could make an important contribution by bringing about more systematic and rational management and protection of water resources.

8. With respect to transboundary oil and natural gas resources, his delegation was of the view that the Commission should proceed with caution. States and industries had immense economic and political stakes in the allocation and regulation of oil and gas resources, and any product of the Commission was likely to be highly controversial. Moreover, States had considerable experience in dealing with transboundary oil and gas issues, and there was no urgent humanitarian need to protect those resources. Most of the current provisions of the articles would be inappropriate for oil and gas deposits, which were not subject to pollution, did not support ecosystems, were not relied on for basic human needs and were not expected to be renewed or preserved for future use. The Commission should not rush into a drafting exercise and should not treat the draft articles on the law of transboundary aquifers as a template for all transboundary resources.

9. On the topic of the obligation to extradite or prosecute, his delegation believed that historically the source of the obligation derived from treaties. However, in the modern age there was a strong and consistent tendency to include the obligation in a very large body of treaties at the bilateral and multilateral levels. Special attention should be paid to the source of the obligation for crimes constituting the most serious breaches of international law, namely, genocide, crimes against humanity and war crimes. Crimes of international terrorism might be added to that list in the foreseeable future.

10. In that regard, it was worth considering the Rome Statute of the International Court of Justice, although his delegation did not intend to revive discussion about the "triple alternative". Because of the serious nature of the crimes under the jurisdiction of the Court, the mechanism for surrendering persons charged with those crimes was *sui generis*; the traditional grounds for refusal of extradition, such as non-extradition of nationals and non-extradition for political offences, were not applicable in the case of a person charged with genocide, crimes against humanity or war crimes. His delegation viewed the special treatment of those crimes as evidence supporting the notion that the obligation to extradite or prosecute for that category of serious crimes belonged to the realm of customary law. Although the obligation to extradite or prosecute and the concept of universal jurisdiction were closely interrelated, the two concepts should be dealt with separately, as they derived from different areas of international law.

11. The Republic of Korea was a party to 24 multilateral treaties containing the obligation to extradite or prosecute, as well as 21 bilateral extradition treaties with similar clauses. In the country's domestic law there was no explicit provision concerning the obligation to extradite or prosecute, but article 3 bis of the Extradition Act provided that if an extradition treaty to which the country was a party had a provision different from that in the Act, the treaty provision should be implemented. Therefore, *aut dedere aut judicare* provisions in extradition treaties to which the country was a party had the force of domestic law.

12. **Mr. Kollár** (Slovakia) said, on the topic of reservations to treaties, that in his eleventh (A/CN.4/574) and twelfth (A/CN.4/584) reports the Special Rapporteur had correctly identified the key issues and main difficulties of the subject. His delegation could basically agree with the approach being taken on the formulation and withdrawal of objections and the procedure for acceptances of reservations. Guidelines for the practice of States and international organizations in respect of reservations was a topic of current interest and would be one of the most important results of the Commission's work.

13. A State or international organization had the right to formulate an objection "for any reason whatsoever", to use the language in draft guideline 2.6.3. Limiting the freedom to make objections exclusively to

reservations that were incompatible with the object and purpose of the treaty would unduly reduce its scope. Moreover, the author of an objection had the right to oppose the entry into force of the treaty as between itself and the reserving State but must clearly express its intention to do so. It was his country's practice to specify in its objections the legal consequences it intended. Further, it would be helpful for both the reserving State and for third parties if the objecting State made the reason for its objection known. The time period for formulating an objection was important; draft guideline 2.6.13 followed the 1986 Vienna Convention in setting a period of 12 months from the date on which the State or international organization had been notified of the reservation or had expressed its consent to be bound by the treaty. It was necessary to draw a clear distinction between that date and the date on which the reservation had been communicated to the depositary.

14. Pre-emptive objections, whereby States declared in advance that they would oppose certain types of reservation before they had even been formulated, appeared to fulfil one of the functions of objections, namely, to give notice to the author of the reservation. On the other hand, a pre-emptive objection could produce legal effects only when the reservation to which it referred had been made. His delegation considered that late objections, those formulated after the 12-month period, were invalid and did not produce legal effects.

15. The attempt to define the object and purpose of the treaty in draft guideline 3.1.5, on incompatibility of a reservation with the object and purpose of the treaty, indicated more a direction than a clear criterion; nonetheless, it was very useful. His delegation could agree with the meanings given in the commentary to the terms "essential element" and "raison d'être" of the treaty. It was by no means easy to put together all the elements to be taken into account in determining the object and purpose of the treaty, but the clarifications to be found in draft guidelines 3.1.5 and 3.1.6 and commentaries were helpful.

16. The next cluster of draft guidelines gave examples of the types of reservations which could be interpreted as incompatible with the object and purpose of the treaty. His delegation welcomed the commentary, which made the issues much more comprehensible. With regard to vague or general reservations worded in such a way as to preclude any determination of their scope, his country had formulated several objections on such grounds, including an objection to the "sharia reservation", which did not clearly indicate to the other States parties the extent to which the reserving State had accepted the treaty obligations. The wording of the draft guideline on reservations contrary to a rule of *jus cogens* rightly covered situations in which, although the provisions to which a reservation referred might not reflect a rule of *jus cogens*, the reservation would cause the treaty to be applied in a manner conflicting with *jus cogens*. His delegation appreciated the detailed commentary on reservations to a provision reflecting a customary norm, reservations relating to internal law and reservations to general human rights treaties. Slovakia had only recently begun formulating objections to reservations, and it found the draft guidelines very helpful.

17. **Mr. Henczel** (Poland), speaking on the topic of reservations to treaties, said that the usefulness of the Guide to Practice would depend on the Commission's ability to limit the number and complexity of guidelines. Furthermore, the wording of the guidelines must follow as closely as possible the terminology used in the Vienna Convention on the Law of Treaties.

18. As for the topic of shared natural resources, the Special Rapporteur had been right to recommend that the Commission should proceed with and complete the second reading of the draft articles on the law of transboundary aquifers independently of its work on other shared natural resources such as oil and natural gas fields. Despite the differences between the various categories of those resources, in future it would be difficult to avoid cross-influences between the provisions governing the divers categories. While it would therefore be unwise for the Commission to wait until it had finished drawing up rules on transboundary aquifers before it turned its attention to oil and natural gas, it was uncertain whether the formulation of regulations on the latter could be pursued without regard to the outcome of deliberations on transboundary groundwaters. For example, the titles of most of the draft articles on the law of transboundary aquifers were equally suited to future rules on oil and natural gas.

19. There were, however, some exceptions deriving mainly from divergences in the physical characteristics of the two groups of natural resources. Draft article 10, dealing with recharge and discharge zones, was not

applicable to oil and natural gas. Similarly, the prevention, reduction and control of pollution raised totally different issues in the case of oil and natural gas, inasmuch as groundwaters should be protected against pollution, whereas oil and natural gas could themselves be a dangerous source of contamination. On the other hand, the argument that the two categories of resources should be subject to different regulations because groundwater was a life-supporting resource, while oil and natural gas were merely energy sources, was an oversimplification which failed to take account of the importance of those energy resources for the improvement of human living conditions.

20. The possible links between the two codification exercises should not be rejected a priori: both elements of the general topic deserved further consideration by the Commission. Pressing ahead with its work on the law of transboundary groundwaters might even prove to be beneficial when the time came to draw up rules for oil and natural gas, in that some of the previously elaborated principles might apply. In fact, some rules would obviously be duplicated. Such duplication should, however, be viewed in a positive light as an element confirming the importance of the regulations in question. A final decision on the form the draft articles should take should not be made in a hurry. The Commission should be flexible in that respect. His delegation fully supported the conclusions reached by the Working Group set up in May 2007, especially those concerning the preparation of a questionnaire on State practice with regard to transboundary oil and gas deposits.

21. Turning to the topic of the obligation to extradite or prosecute, he said with reference to the most controversial aspect of the subject, namely the source of the obligation, that the possibility of recognizing customary rules as the basis of the obligation should not be rejected a priori. That question called for deep and careful analysis and the examination of various aspects of State practice. Moreover, it was possible that some links might exist between universal jurisdiction and the *aut dedere aut judicare* principle. Lastly, his delegation approved of draft article 1, as proposed by the Special Rapporteur, and also supported his general ideas concerning further draft articles.

The meeting rose at 10.50 a.m.